STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH ANDRE-ROBERT PAQUETTE and FAITH PAQUETTE,

Plaintiffs-Appellants,

v

MOTOR AUCTION GROUP, a/k/a COPART OF CONNECTICUT, INC., and CURTIS KAYE,

Defendants-Appellees,

and

DOOR GROUP, a division of OVERHEAD DOOR CORPORATION,

Defendant.

UNPUBLISHED
April 3, 2007

No. 270979
Wayne Circuit Court
LC No. 02-224976-NO

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiffs Joseph and Faith Paquette[1] appeal as of right from an order granting summary disposition to defendant Motor Auction Group ("defendant") under MCR 2.116(C)(8) and (C)(10). We affirm.[2]

[1] Because plaintiff Faith Paquette's claims are derivative in nature, the singular term "plaintiff" shall be used to refer to the parties bringing this action.

[2] We reject defendant's argument that this Court lacks jurisdiction over this appeal. This Court dismissed plaintiffs' first appeal because the original order of dismissal, dismissing plaintiffs' remaining claims against defendant Kaye without prejudice, was not a final order within the meaning of MCR 7.202(7)(a)(i). Accordingly, under MCR 2.604(A), the order was "subject to revision [by the trial court] before entry of final judgment." The trial court subsequently entered an order dismissing plaintiffs' remaining claims against defendant Kaye with prejudice, and plaintiffs timely filed their claim of appeal from that order.

A. Standard of Review

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996); see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). A trial court's grant of summary disposition is also reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Maiden* at 119-120. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* The motion may be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possible justify recovery. *Id.*

B. Premises Liability

Plaintiff was injured at an automobile auction when a commercial garage door operated by the auctioneer, Curtis Kaye, closed on him. Kaye is an independent contractor who conducts auctions for various entities. The auction was held on business premises leased by defendant. Plaintiff argues that his complaint asserts a claim for ordinary negligence and is not based on a theory of premises liability. Therefore, plaintiff claims the trial court erred by relying on the open and obvious doctrine to dismiss plaintiff's claim. Plaintiff's counsel in oral argument before this Court restated that this matter does not involve a claim of premises liability. Given plaintiff's stipulation on this issue, we agree with plaintiff that the open and obvious doctrine is not a basis on which to affirm the judgment entered in favor of defendant.

C. Plaintiff's Claims of Ordinary Negligence

Plaintiff next argues that defendant was negligent in any of four different ways: (1) improper installation of the garage door; (2) the failure to ensure that the operation of the garage door remained in the control of an employee, agent or subcontractor trained in the operation of the door; (3) the failure to properly train independent contractor Kaye in the operation of the garage door; and (4) the failure to properly supervise its agents and subcontractors. We conclude there is no merit to any of Plaintiff's claims.

Plaintiff's claim of improper installation of the garage door is nothing more than an attempt to end-run his stipulation that he is not asserting a premises liability claim. If the garage door was in fact improperly installed, it amounts to a dangerous condition on the premises that would form the foundation of a premises liability claim. Plaintiff cannot abandon a theory of premises liability to avoid consideration of the open and obvious doctrine, and at the same time assert liability against defendant for the placement of a dangerous condition on the premises.

Plaintiff's remaining three claims of negligence attempt to impose liability against defendant for the conduct of Kaye, an independent contractor who conducted the auction. Simply put, plaintiff claims that defendant was under a legal duty to train or supervise Kaye. We

hold that such a claim fails as a matter of law. In *Reaves v Kmart Corp*, 229 Mich App 466, 476; 582 NW2d 841 (1998), this Court held:

> When an independent contractor is called upon to perform tasks that a person of average intelligence can perform with minimal or no training and that task may be accomplished in a multiplicity of methods, the person hiring the independent contractor ought to be able to presume that the independent contractor can competently perform the duties assigned to her. There should be no need to investigate to determine whether the independent contractor has the resources and abilities to perform properly the assigned tasks. *Id.*

Moreover, plaintiff fails to cite any authority holding that an employer has a duty to train or supervise an independent contractor. The only case cited by plaintiffs, *Schultz v Consumers Power Co*, 443 Mich 445, 447, 449, 454 n 10; 506 NW2d 175 (1993), involved a utility company's duty to inspect, repair, and install electrical conductors, not a duty to train or supervise independent contractors. Thus, the trial court correctly found that plaintiffs failed to show that defendant had a duty to train or supervise Kaye in the operation of the door.

Finally, plaintiff maintains that defendant should be held liable for the conduct of Kaye because defendant retained control over the work performed by Kaye. "At common-law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004); see also *Ghaffari v Turner Constr Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). But in *Funk v Gen Motors Corp*, 392 Mich 91, 102, 104-105; 220 NW2d 641 (1974), overruled on other grounds in *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), our Supreme Court held that a general contractor could be held liable for the negligence of its subcontractors and their employees if (1) the defendant general contractor failed to take reasonable steps within its supervisory and coordinating authority, (2) to guard against readily observable and avoidable dangers, (3) that created a high degree of risk to a significant number of workers, (4) in a common work area. *Ormsby*, *supra* at 54, 57. "[O]nly when the *Funk* four-part 'common work area' test is satisfied may an *injured employee of an independent subcontractor* sue the general contractor for that contractor's alleged negligence." *Ormsby*, *supra* at 59 (emphasis added). The failure to satisfy any of the elements of this test is fatal to the claim. *Id.*

The underlying basis for the common work area rule is that "[p]lacing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Ghaffari*, *supra* at 20-21 (internal citation and quotation marks omitted). The *Funk* Court added that when a property owner exercises a high degree of control over the project, essentially stepping into the shoes of the general contractor, it should also be held liable under this test. *Funk*, *supra* at 105, 108. In such cases, the property owner "ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor." *Id*. at 108.

Until recently, it was unsettled whether the *Funk* Court created one or two exceptions, i.e., "common work area doctrine" and "retained control doctrine." See *Ormsby*, *supra* at 48. In *Ormsby*, however, the Supreme Court clarified "that these two doctrines are not two distinct and separate exceptions, rather only one—the 'common work area doctrine'—is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees." *Id*. at 49.

"[T]he 'retained control doctrine' is . . . subordinate to the 'common work area doctrine' and is not itself an exception to the general rule of nonliability." *Id*. "Rather, it simply stands for the proposition that when the *Funk* 'common work area doctrine' would apply, and the property owner has sufficiently 'retained control' over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor." *Id*. In other words, "if a property owner assumes the role of a general contractor, such owner assumes the unique duties and obligations of a general contractor." *Id*.

There is no support in the case law for plaintiffs' argument that the retained control doctrine applies outside the context of construction sites, particularly given its goal of ensuring safe working conditions. Additionally, even if the doctrine could be applied in the present context, it is now clear that there is no retained control doctrine separate from the common work area doctrine. Plaintiff was not injured while working as an employee of a subcontractor and, therefore, the doctrine is not intended to protect him. See *id*. at 59. Thus, the trial court correctly held that the retained control doctrine does not impose vicarious liability on defendant for Kaye's allegedly negligent conduct.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra